

No. 9857.

22

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE J. SOMERVILLE, also known as SLIM SUMMER-
VILLE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

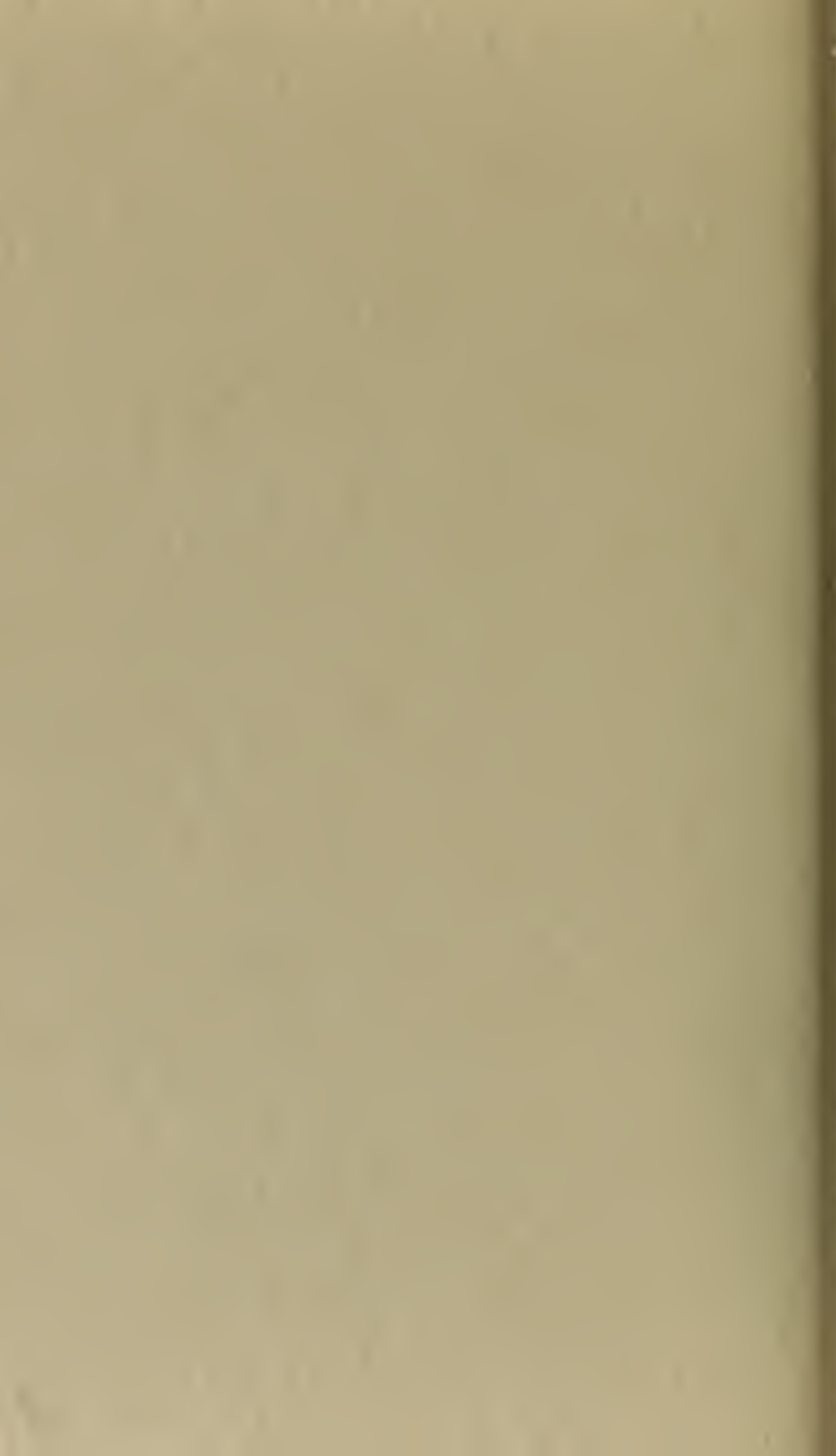
Respondent.

PETITIONER'S REPLY BRIEF.

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Preliminary Statement.

The jurisdictional statement, statement of facts and specifications of error are contained in petitioner's opening brief (pages 1-4). This brief is devoted solely to answering the argument contained in respondent's brief.

ARGUMENT.

Petitioner and respondent agree that the question involved in this case is whether the contract entered into by petitioner and his wife destroyed the community character of petitioner's earnings during the continuance of the marriage relationship. (Resp. Br. p. 14.)

The authorities cited by petitioner in his opening brief, with two exceptions hereinafter specifically referred to, are disposed of by respondent in the following language:

“Some of the cases particularly relied upon by the petitioner in support of this argument are cases decided by the California courts in which the widow, after the death of her husband, sought a family allowance during the period of the administration of his estate. (Br. 20-26.) In each of those cases the spouses had entered into a property-settlement agreement prior to the death of the husband, and the allowance was contested by the estate on the ground that the wife had waived it under the terms of the property-settlement agreement. But those cases are different from the instant case in important respects. In the first place, those cases, like the instant case, depended upon the interpretation of the property settlement involved. But of far greater importance is the fact that the question involved was whether the widow had waived her family allowance, and that depended upon a construction of the property-settlement agreement. No such question is involved here.” (Resp. Br. p. 15.)

In the first place the cases cited by petitioner all dealt with the construction of property settlement agreements and more particularly whether one of the parties had waived a property right that grew from the marriage relation. The right to a probate homestead, family allowance or to share in the estate of a deceased spouse through a successful contest are all valuable property rights and all of said rights are incident to and founded upon the marriage relationship. Likewise the right of a spouse to one-half of the community income is dependent upon that relationship. Decisions involving the construction of property

settlement agreements should be considered in point whether they deal with future earnings or some other property rights of the parties. It must be remembered that all of these elements of property settlement agreements, namely, probate homestead, family allowance and future community earnings, are authorized by and founded upon Sections 158 and 159 of the Civil Code of the State of California. Those sections do not refer solely to the question of future income but authorize a husband and wife to contract generally with relation to their property. Therefore, it is not sound to contend that decisions are not in point which interpret property settlement agreements because the question involved is whether or not the spouse has waived a probate homestead or family allowance.

We concede that no one but a husband and wife can own community property and when their status as such is dissolved, they cannot thereafter acquire community property. Therefore, there is no question but what petitioner's income after the final divorce constitutes his separate income and is taxable with reference to that status.

Respondent makes no mention of *Sherman v. Commissioner* (9 Cir.), 76 Fed. (2d) 810, cited in petitioner's brief (p. 10). That case deals with the construction of a property settlement agreement between a husband and wife residing in California. It was contended by the wife that the agreement had the effect of making the future earnings of her husband his sole and separate property, and she and her husband testified before the Board that it was their intention to so provide in the agreement. In that case, as in the case before the Court, the parties had made various provisions with relation to their property, but had made no provision changing the character of the

future earnings of the husband. This Court, in the following clear and explicit language, held that the earnings of the husband, therefore, were community:

“Bearing in mind that the wife has an immediate vested interest in one-half of the earnings of the husband, in the absence of any conveyance or agreement by her transferring her right to the husband, it would be retained by her and be subject to tax as her income.”

Sherman v. Commissioner, 76 Fed. (2d) 810-811.

The only authorities cited by petitioner in his opening brief that are specifically referred to by respondent are *Biggi v. Biggi*, 98 Cal. 39, and *Estate of Hurley*, 28 Cal. App. (2d) 584. In referring to those cases the respondent makes the following comment:

“The decisions in *Biggi v. Biggi*, 98 Cal. 35, and *Estate of Hurley*, 28 Cal. App. (2d) 584, cited by petitioner (Br. 15, 17), are equally inapplicable here. The former decision dealt with disposition of a parcel of real estate covered by a general property settlement, while the latter dealt with the surviving husband’s rights in the estate of his deceased wife under a property-settlement agreement, which was in no way comparable with the agreement executed by this petitioner and his wife.” (Resp. Br. pp. 16 and 17.)

We will not again set forth in detail the facts and holdings of the Court in those cases, but refer the Court to our opening brief, pages 15-17, for *Biggi v. Biggi* and pages 17-20 for *Estate of Hurley*. Suffice it to say that each of said cases dealt with the construction of a property settlement agreement between a husband and wife

and the law of California relative to the interpretation of the language of such agreements, especially wherein the waiver of a property right is involved.

On three different instances the respondent reverts to the statement "When the agreement is considered as a whole, it is clear that the parties intended all future earnings of the petitioner to be his separate property." (Resp. Br. pp. 11 and 17.) We agree to the proposition that a contract must be considered as a whole, especially when there is no specific provision that effectually disposes of a problem that arises under it. However, as pointed out in our opening brief, the specific provisions of a contract control over the general provisions. (Pet. Br. p. 14.) Under the agreement that the Court is here called upon to construe, it was specifically provided that the wife is to receive and retain one-half of petitioner's earnings for the period in question. [R. p. 44.] Having retained and not transferred her community one-half interest in those earnings, she comes within the holding of *Sherman v. Commissioner, supra*, hereinabove cited and quoted from.

Respondent closes his brief by asserting:

"In this respect the instant case does not differ materially from *Boland v. Commissioner*, 118 F. (2d) 622 (C. C. A. 9th), and *Woodall v. Commissioner*, 105 F. (2d) 474 (C. C. A. 9th). In each case the spouses entered into a property-settlement agreement similar to the one here involved. In the *Boland* case the agreement provided for payment of a percentage of the taxpayer's personal earnings to his wife for life or until she remarry, whether divorced or not, while in the *Woodall* case the taxpayer's husband received substantially one-half her earnings under their understanding of the agreement until they were

finally divorced. On authority of those two decisions, and other decisions of this Court cited above, it must be concluded that this petitioner's personal earnings subsequent to execution of the property-settlement agreement with his wife were his separate property and taxable entirely to him." (Resp. Br. p. 18.)

This statement betrays the weakness of respondent's position for the two cases cited are not authority for anything that this Court has to decide. In *Boland v. Commissioner*, 118 Fed. (2d) 622 (9th Circuit), the agreement provided:

"The parties hereto also being desirous of settling their respective rights in and to the community property of the parties hereto now existing and of . . . fixing and determining the character of the property hereafter to be acquired by the parties hereto, and . . . and said party of the second part hereby agrees that the portion of the income of the party of the first part not hereinabove in paragraph (1) hereof assigned to the party of the second part and any proceeds from the investment or reinvestment of said portion of said income shall be and become the separate property of the party of the first part."

In construing that language, this Court rightfully held:

"This evidences a fixed determination to strip any future income of its community character, but the operative parts of the agreement are also inconsistent with the concept of community property."

In *Woodall v. Commissioner*, 105 Fed. (2d) 474-475, 476, the Court construed a property settlement between a husband and wife, which, according to the opinion of the Court, contained the following provision with respect to the future earnings of the parties:

“All property hereafter acquired, in whatsoever manner, and all earnings which may be acquired by either of the parties, shall be the sole and separate property of the party so acquiring it, free from all claims, rights or interests of the other.”

If the agreement between the Somervilles contained such language, the petitioner would not now be before this Court.

The further and main contention in the *Woodall* case is stated in this language, at page 477 of the opinion:

“The petitioner contends that Section 169 of the Civil Code of California is not applicable; that the written property settlement agreement of April 20, 1932, was modified, abrogated, or superseded by an oral agreement made immediately upon the signing of the written agreement; that the earnings of both spouses are community property until the entry of the final decree of divorce; that the Board failed to distinguish between the circumstances which existed prior and subsequent to April 20, 1932 (the date of the entry of the interlocutory decree of divorce);”

and is disposed of by the Court in the following manner, at page 478 of the opinion:

“So far as the testimony of petitioner and Gallery to the effect that the written agreement was nullified, almost before the signatures were dry, by an oral agreement, we are of opinion that the Board did not err in declining to find that such agreement was in fact made. The Board saw and heard the witnesses and weighed the testimony; neither process is a function of this court.”

When respondent rests his case on authorities such as the two just mentioned, we believe that we have every right to assert that he has a weak foundation in law for the position which he is attempting to maintain.

Conclusion.

The decision of the Board of Tax Appeals is contrary to the facts and the law and should be reversed.

Respectfully submitted,

EDWARD L. CONROY,

DON CONROY,

Attorneys for Petitioner.

APPENDIX.

Statutes Involved.

Civil Code of State of California, Div. 1, Pt. 3, Tit. 1, Ch. 3.

"#157. In other respects their interests separate. Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling. (Enacted 1872.)"

"#158. Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts. (Enacted 1872.)"

"161a. (Interests in community property.) The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. (Added by Stats. 1927, p. 484.)" 44